HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1955

No. 453

WM. H. MULLER & CO., INC.,
Petitioner-Appellant Below,

versus

SWEDISH AMERICAN LINE LTD. and TRANSATLANTIC STEAMSHIP COMPANY, LTD.,
Respondent-Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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October, 1955.

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SWEDISH AMERICAN LINE LTD. and TRANSATLANTIC STEAMSHIP COMPANY, LTD.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner seeks that a Writ of Certiorari issue to review the decree of the Court of Appeals for the Second Circuit affirming the decision and decree of the United States District Court for the Southern District of New York which ordered dismissal of the libel herein and, in support of its petition, respectfully shows:

I. Question Presented.

The important controversial question of law presented for determination in this case is:

> May an American citizen dealing in international commerce, who sues in his own right for loss of his cargo during transportation from a foreign to a United States port, be deprived of redress in our admiralty courts because the foreign steamship owner, in issuing his bill of lading, inserted therein

a clause requiring exclusive jurisdiction of disputes in the courts of a foreign country?

By holding the clause valid and enforceable because of its "reasonableness," the Court of Appeals refused to follow the law as enunciated in *Insurance Company* v. *Morse*[1] but accepted the dictum of Judge LEARNED HAND in *Krenger* v. *Pennsylvania Railroad Co.*[2]

The validity of unilateral provisions in bills of lading requiring suit in a foreign land is of urgent moment to the maritime industry and American importers of foreign goods. For the first time the importers now find themselves remediless under the decision of the court below, if their damages are not sufficiently large to support the expense of a referral of the cause to whichever foreign country the ocean carrier stipulates to be the forum of litigation.

In the determination of this question it now must be decided whether a citizen of the United States has an absolute right to invoke and maintain the jurisdiction in our courts over his asserted claim. When in 1950 this question was last before this court,[3] it was coupled with the application of the doctrine *forum non conveniens* and then this court said: "The doctrine is of long standing in admiralty, but this Court has not previously had to apply it to a suit brought by a United States citizen * * *. We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens."

Until the decision below, similar clauses had never been held valid although some district judges had considered the clause as an element in a decision based upon

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[1] 87 U. S. 445.

[2] 2 Cir. 174 F. (2) 556.

[3] *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U. S. 684, 697.

forum non conveniens.[4] Thus the decision below is the first to uphold the clause as valid and enforceable in and of itself even though such court admitted that its ruling was in conflict with *Insurance Company* v. *Morse* and a long line of decisions which hold such clauses to be null and void.[5] It is even more extraordinary that the court should arrive at such conclusion without discussing or ruling upon petitioner's contention that a United States citizen may not be relegated to a foreign country for the determination of his claim.

While this court in the *Swift* case considered the question abstract and declined to pass upon it, we believe it is now squarely before this court to pass upon the asserted absolute right of a citizen to redress before our courts.

Authoritative and definitive resolution of the question is of greatest moment to the entire maritime industry as well as the businesses engaged in international commerce affected thereby.

II. Jurisdiction and Opinions Below.

Jurisdiction of this cause in the court of first instance lies under 28 U. S. C. 1333.

Jurisdiction of this court lies under 28 U. S. C. 1254. The opinion of the District Court was rendered on August 17, 1954 and entered on August 24, 1954 and is unreported. The opinion of the Court of Appeals was rendered and entered on July 15, 1955 and is unreported.

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[4] E.g., *The Geisha,* 94 F. Supp. 60 (S. D. N. Y.), Aff'd 2 Cir., 187 F. (2) 990; *The Iquitos,* 286 Fed. 383 (W. D. Wash. 1921); *The Tricolor,* 2 Cir., 65 Fed. (2) 392.

[5] "It is true that there has been much difference of opinion over the validity of contractual provisions which purport to limit a jurisdiction which would otherwise attach. The law has long viewed such agreements askance. This can readily be seen by comparing § 558 of the Restatement of the Law of Contracts with § 617 of the Restatement of Conflicts of Law. For a general discussion of the older law see also Insurance Co. v. Morse, 87 U. S. 445; * * *". From opinion of the Court of Appeals in this case at page 55 of Record.

III. Statement of the Case.

Petitioner, a New York corporation, brought this action in admiralty to recover from the Swedish owners of the *M/V Oklahoma* the value of its cargo of cocoa beans which was lost when the vessel split in two and sank during a voyage from Gothenburg to east coast United States ports.

The shipper of this cargo as shown on the bill of lading was Fallenius & Lefflers A. B. of Gothenburg, Sweden. The consignee was "order of A. Johnson & Co. Inc., New York." Petitioner is the purchaser of the original negotiable bill of lading which bears the endorsement in blank of A. Johnson & Co. Inc. and thereby became entitled to delivery of the cargo.

By way of explanation it should be noted that in its most simple application a transaction in international or foreign commerce originates by the purchase of a commodity from a foreign seller, payment for which is to be made against sight draft at the buyer's bank. The seller thereupon assembles and packages the commodity, delivers it at seaport to the ocean carrier, receives in exchange a printed form bill of lading which, with his invoice, is mailed or presented to the consignee's bank. Thereupon title to the goods passes to the buyer although he does not view the bill of lading or ascertain its terms until long after the goods are already in transit.

Among the cargoes totally lost as a result of this occurrence were those of fifty-four (54) other United States citizens. Libels asserting the claims of such other cargo owners were similarly filed in admiralty before the District Court in New York. Such causes, by agreement among counsel, have been stipulated to abide the ultimate decision of this court in this cause.

Petitioner's cargo and those of all such other libelants were shipped by foreign shippers under identical bills of lading which contained the following clause:

> "JURISDICTION. Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish courts, to the jurisdiction of which the carrier submits himself."

On motion the District Court dismissed the libel and referred petitioner to Sweden, holding that the clause constituted an agreement which should be given effect. The decision of such court was not based upon the doctrine *forum non conveniens* but on the grounds that there was no showing that petitioner cannot obtain justice in Sweden and that there is no problem of the statute of limitations nor of the applicability of the United States Carriage of Goods by Sea Act by the Swedish courts.

Affirming, the Court of Appeals held that despite the "older law" which "has long viewed such agreements askance" the clause is enforceable since it is "reasonable."

Its approach to the determination that the clause was "reasonable" was not on a basis of any expressed agreement or intentions of the foreign shipper and foreign carrier made coincident with the issuance of the bill of lading but upon the reasoning that because the *M/V Oklahoma* was Swedish owned and built and the members of her crew resided in Sweden, the clause was thereby reasonable and enforceable.

Such reasoning applies to a consideration of the question "*forum non conveniens*" not, we submit, to the construction of a clause in a bill of lading.

We cannot help but conclude from the decision of the Court of Appeals that such court, realizing that in the *Swift* case it was believed the question then to be abstract, knowingly passed on to this Court for ultimate decision, the question of a citizen's right to the maintenance of litigation in our courts.

Today, with the tremendous registration of both American and foreign controlled ocean vessels under the

Liberian, Panamanian and Central American country flags, a situation will soon result that American importers will be relegated to these and other foreign courts by the simple expedient of insertion in bills of lading of a unilateral clause requiring the litigation of disputes in foreign countries.

Definitive action must be taken by this court to guard against irreparable harm to the importers of this country.

IV. Reasons Relied on for Allowance of the Writ.

The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

By deciding that a United States citizen may be remitted to a foreign country for his legal redress in an admiralty cause, the Court of Appeals has closed, in that circuit, a question which was of sufficient moment to be singled out for comment by this court in *Swift & Company Packers* v. *Compania Colombiana Del Caribe, S. A.*, 339 U. S. 684, 70 S. Ct. 861, 1950 A. M. C. 1089. This court in such case left the question open but deliberately noted that it had never had to apply the doctrine of *forum non conveniens* to a suit brought by a United States citizen and that it had rarely been so applied by the lower courts.

Therefore, the predicament in which American importers presently find themselves undoubtedly stems from the absence of a definitive statement on the part of this court regarding the lack of or limited jurisdiction in lower courts in referring citizens to foreign countries.

To fill the gap left by the *Swift* case a trend has sprung up in the lower courts to qualify or restrict the established rule that clauses calling for exclusive jurisdiction in foreign countries are invalid where citizens are involved, by proclaiming that the judges have the inherent right to exercise discretion in determining whether to retain or

deny jurisdiction dependent upon the facts of the particular case. This trend was recognized by the Court of Appeals for the Fifth Circuit in the case of *Burt* v. *Isthmus Development Co.*[6] decided in 1955, which concerned an action for damages brought in Texas by a New York citizen against a corporation domiciled in Texas. Defendant moved to dismiss on the ground that the contract sued upon restricted the parties to suit in Mexico and on the further ground of *forum non conveniens.* The Court of Appeals found it unnecessary to pass on the contract provision but reversed the district court's dismissal of the suit on the ground of *forum non conveniens* citing *The Saudades*[7] and the *Swift* cases, and stating:[8] "It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect to decree that a citizen must go to a foreign country to seek redress of an alleged wrong".

The court, for reasons otherwise stated in the opinion, chose not to pass upon the question of a citizen's absolute right to maintain his suit in our courts, commenting upon the fact that the Supreme Court, in the *Swift* case, had declined to pass upon that question. Accordingly the question again was left undecided.

The trend of broadening the discretionary powers of the District Court, until the decision in this case, thus had never extended so far as to refer a citizen, suing in his own right, to a foreign country for the litigation of his claim.[9]

In 1933, the Court of Appeals for the Second Circuit in the oft cited case of *The Tricolor*[10] did hold that a plea of inconvenience may prevail against an American under-

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[6] 5 Cir. 218 F. (2d) 353, cert. den. 349 U. S. 922, 75 S. Ct. 661.

[7] 67 F. Supp. 820.

[8] *Supra,* footnote 6, at page 357.

[9] This was recognized by the District Court in this case.

[10] 2 Cir. 65 F. (2d) 392.

writer as subrogee of a foreign cargo owner, but the rationale, in such case, was the well established rule that the rights of a subrogee can rise no higher than those of its subrogor, especially jurisdictional rights. LEARNED HAND, Ch. J., who wrote the opinion made it clear that the result would have been different if the citizen were suing in his own right.[11]

In *The Geisha*[12] in 1950 wherein the Second Circuit Court of Appeals affirmed the District Court's declination of jurisdiction, the libelant was considered merely the assignee of an alien, since the latter had title to the goods at the time of the loss, and the holding of that case is but a logical sequel to *The Tricolor* case.

Now it seems that the trend has reached the point where American citizens may be deprived of redress in our courts by the simple expedient of a foreign shipowner inserting in his bill of lading a provision requiring suit before the courts of his homeland. Should his vessel be foreign built and manned by a crew claiming foreign citizenship, it seems then to follow that, *ipso facto,* litigation will be restricted to the courts of such shipowner's choosing. Such cannot be the intendment of our courts.

It is singular to note that in deciding the District Court had discretion to decline jurisdiction and refer a United States citizen suing in his own right to a foreign country, the court below neither referred to nor gave heed to the "different" considerations[13] referred to by this court in

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[11] On pages 392-393, he wrote "But the libellant is a citizen and asserts its absolute privilege of resort to its own courts, independently of any convenience to the respondent. How far such inconvenience can be recognized, depends upon the local procedure which at times does indeed protect a nonresident from local suit. Courts are maintained to give redress primarily to their own citizens; it is enough if these conform to the conditions set upon their jurisdiction. *All this is entirely true, and would be conclusive, if the libellant sued in its own right.*" (Emphasis supplied.)

[12] 187 F. (2d) 990.

[13] "Application of *forum non conveniens* principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners" (p. 697).

the *Swift* case. This court did not find it necessary to set forth what those considerations were, but it would not be presumptuous to suggest that its theory was not unlike that in the well reasoned opinion of KIRKPATRICK, D. J.,[14] wherein he denied a plea of *forum non conveniens* on the ground that "an American court may not refuse to try a case brought by an American citizen unless it feels that injustice would be done by allowing him to proceed in his own court".[15]

The Court of Appeals, in fact recognized the unsettled nature of the question[16] but chose to follow the dictum of LEARNED HAND, Ch. J., in the inapposite case of *Krenger* v. *Pennsylvania R. R. Co.*,[17] and apply it to this admiralty matter with full force and vigour. The application of the *Krenger* dictum however to the instant case serves only to confound the rights of United States importers further, since it is a far different course to send citizens to foreign countries, than to another United States District, more conveniently located to the parties. Corbin on Contracts emphatically supports this view.[18]

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[14] *The Saudades, supra,* footnote 7.

[15] (p. 821) "The result of such a rule is that the discretion of the Court, so far as it has any existence, is limited, and that mere inconvenience to the respondent, or to both parties, will not be considered a ground for exercising it to refuse jurisdiction."

[16] *Supra,* footnote 5.

[17] *Supra,* footnote 2. The *Krenger* case was an action for personal injuries under the Federal Employers Liability Act. Plaintiff and defendant agreed *after the injury* that plaintiff would not sue except in the state where the injuries were sustained or where the plaintiff was then living. Plaintiff sued in the Eastern District of New York in violation of the agreement. The District Court granted plaintiff's motion to strike from the answer the defense of improper venue and the Second Circuit Court of Appeals affirmed on the ground that the contract was illegal as an exemption of a liability granted by the Act. L. HAND, Ch. J., concurred in the result on the ground that the contract was against public policy. Specifically, he referred to the revulsion of the courts for such contracts and Congress' consideration that the employee bargains at a disadvantage in respect to venue. He stated the contract would have been valid if defendant proved it to be reasonable and based on fairness.

[18] In 6 Corbin on Contracts, § 1445, referred to by the Court of Appeals, that learned author states "Our courts are practically certain to disregard the limiting provision if it is one that would have the effect of requiring one of our own citizens to go to a foreign or distant land to obtain justice."

We further urge this court to recognize that,

The Court of Appeals below has decided a federal question in a way in conflict with applicable decisions of this Court.

This we submit is error. As early as 1874, in *Insurance Company* v. *Morse,* this court held that agreements in advance of a dispute, tending to oust the courts of the jurisdiction conferred in them by law, are illegal and void. In such case, the State of Wisconsin provided by statute that as a condition precedent to doing business in that State, all foreign corporations must agree not to remove any action to the federal courts. The insurance company did agree to this, but when sued upon its policy allegedly violated the agreement by removing a cause to the federal court. The Supreme Court of Wisconsin upheld the agreement, but this court thereupon reversed with no qualification that the agreement would have been valid, if reasonable.

The principle enunciated in the *Morse* case has been often cited and followed, and was specifically approved by this court in *Barron* v. *Burnside.*[19]

The *Morse* case was undoubtedly responsible for the long line of decisions, federal and state, holding such clauses, *per se,* null and void.[20] The decision of the Court

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[19] 121 U. S. 186, 7 S. Ct. 931, 30 L. Ed. 915 (1887).

[20] e.g., *Otto A. C. Hagen Corporation* v. *Steamship Edam, et al.,* 27 Fed. Supp. 8 (S. D. N. Y. 1938);
S. S. Joh Gorthon, 1949 A. M. C. 1198 (no official citation);
Prince Steam-Shipping Co. v. *Lehman,* 39 Fed. 704 (S. D. N. Y. 1889);
Slocum v. *Western Assurance Co.,* 42 F. 235 (S. D. N. Y. 1890);
The Etona, 64 F. 880 (S. D. N. Y. 1894); aff'd 71 F. 895;
Gough v. *Hamburg Amerikanische Paketfahrt Aktiengesellschaft,* 158 F. 174 (S. D. N. Y. 1907);
In re Application of Hamburg America Line, 135 Misc. 715, 238 N. Y. S. 331 (1930); aff'd 228 App. Div. 802, 239 N. Y. S. 914;
In re Andrus' Will, 156 Misc. 268, 281 N. Y. S. 831 (1935);
Parker v. *Kraus Co., Ltd.,* 157 Misc. 667, 284 N. Y. S. 478; aff'd 249 App. Div. 718, 292 N. Y. S. 955.

of Appeals recognizes the existence of the long line of authorities, including the *Morse* case, but considers that they no longer represent the public policy of the United States, but that the dictum of LEARNED HAND, Ch. J., in the *Krenger* case represents a view superior to that which is the basis of the *Morse* case.

V. Conclusion.

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

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